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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 110131070–2626–02]

RIN 0648–XG781

Pacific Island Pelagic Fisheries; False Killer Whale Take Reduction Plan; Closure of Southern Exclusion Zone

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; area closure; request for comments.

SUMMARY: NMFS is closing the Southern Exclusion Zone (SEZ) to deep-set longline fishing for all vessels registered under the Hawaii longline limited access program, as a result of the fishery reaching the established annual trigger of two observed false killer whale mortalities or serious injuries (M&SI) in the fishery within the U.S. Exclusive Economic Zone (EEZ) around Hawaii. This action is necessary to comply with False Killer Whale Take Reduction Plan (Plan) regulations that establish the SEZ closure trigger and procedures to limit M&SI of false killer whales in the Hawaii deep-set longline fishery.

DATES: Effective February 22, 2019.

NMFS must receive comments by *[insert date 30 calendar days after date of publication in the FEDERAL REGISTER]*.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2019–0005, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov#!docketDetail;D=NOAA-NMFS-2019-0005. Click the “Comment Now” icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), attention Kevin Brindock, Protected Resources, 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

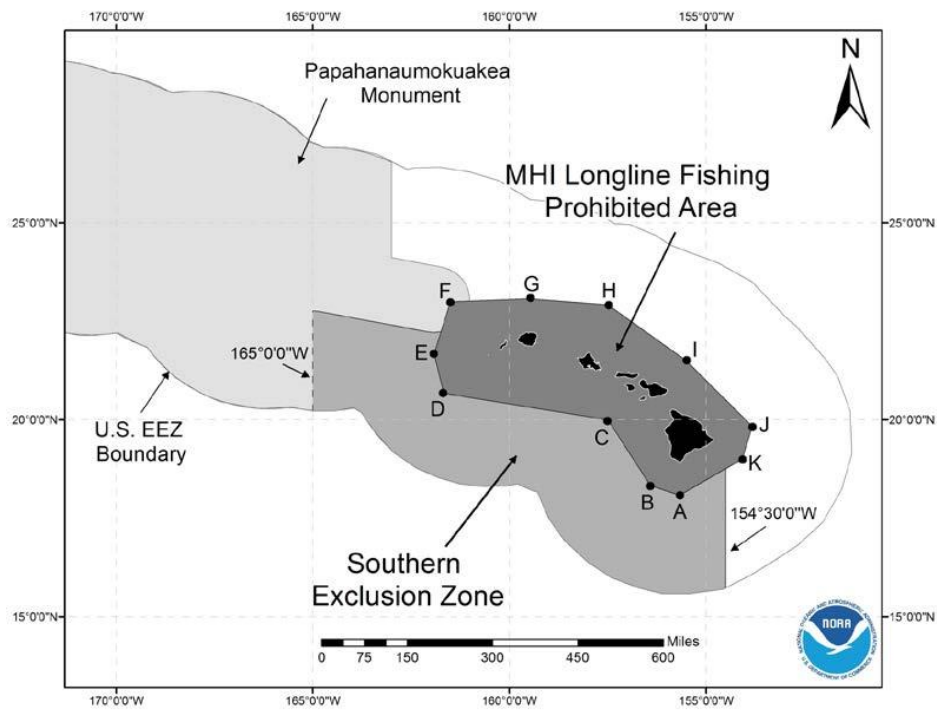
Instructions: NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Kevin Brindock, Protected Resources, NMFS Pacific Islands Regional Office, 808-725-5146, kevin.brindock@noaa.gov; or Kristy Long, NMFS Office of Protected Resources, 206-526-4792, kristy.long@noaa.gov.

SUPPLEMENTARY INFORMATION: The False Killer Whale Take Reduction Plan (Plan) was implemented on December 31, 2012, pursuant to section 118(f) of the Marine Mammal Protection Act (MMPA) to reduce the level of incidental M&SI of the Hawaii pelagic and Hawaii insular stocks of false killer whales in the Hawaii longline fisheries (77 FR 71260; November 29, 2012). The Plan, based on consensus recommendations from the False Killer Whale Take Reduction Team, was implemented by regulations, which included the creation of

the SEZ that would be closed to deep-set longline fishing if a certain number (trigger) of false killer whale M&SI are observed in the deep-set fishery in the EEZ. As described in the Plan regulations (50 CFR 229.37(d)(2)), the SEZ is bounded on the east at 154° 30' W. longitude, on the west at 165° W. longitude, on the north by the boundaries of the Main Hawaiian Islands Longline Fishing Prohibited Area and Papahānaumokuākea Marine National Monument, and on the south by the EEZ boundary (see Fig. 1). A SEZ closure is triggered if, after expanding the number of observed M&SI, the Hawaii pelagic stock's potential biological removal (PBR) level has been exceeded. The 2012 final rule set the trigger as the larger of either two observed M&SI of false killer whales within the EEZ around Hawaii, or the smallest number of observed M&SI of false killer whales that, when extrapolated based on the percentage observer coverage for that year (20 percent), exceeds PBR. Under the final 2017 Stock Assessment Report, PBR is 9.3 pelagic false killer whales per year. Accordingly, with 20 percent observer coverage, the current trigger remains two observed M&SI (*i.e.*, two observed M&SI expands to 10, which exceeds PBR of 9.3).

Figure 1. Southern Exclusion Zone.



NMFS-certified fishery observers documented two false killer whales hooked during deep-set trips in the U.S. EEZ, one each on January 10 and January 15, 2019. One of these interactions resulted in a mortality and the other animal was released injured. NMFS followed the procedures outlined in the final rule and criteria in the NMFS process for distinguishing serious from non-serious injuries of marine mammals (NMFS Policy Directive PD 02-238 and NMFS Instruction 02-238-01) to evaluate the injury of the animal that was released injured, and determined that it was a serious injury. Therefore, NMFS has determined that the SEZ trigger (*i.e.*, two M&SI) has been met, and closing the SEZ to deep-set longline fishing is required to comply with the Plan.

In accordance with 50 CFR 229.37(e)(6)), NMFS must publish notification that the SEZ will be closed to deep-set longline fishing beginning on a specified date, which is not earlier than 7 days and not later than 15 days after the date of filing the closure notice for public inspection at the Office of the Federal Register. During the closure, it is prohibited to fish using deep-set longline gear in the SEZ.

The SEZ was closed to deep-set longline fishing on July 24, 2018, following four false killer whale serious injuries in the Hawaii deep-set longline fishery that occurred inside the EEZ around Hawaii during that calendar year. The SEZ was reopened to deep-set longline fishing on January 1, 2019. Because an observed false killer whale mortality or serious injury in the EEZ around Hawaii met the established trigger in the subsequent calendar year following an SEZ closure, the SEZ will be closed until one or more of the following criteria described in the Plan regulations (50 CFR 229.37(e)(5)) are met: (i) The Assistant Administrator determines, upon consideration of the False Killer Whale Take Reduction Team's recommendations and evaluation of all relevant circumstances, that reopening of the SEZ is warranted; (ii) In the two-

year period immediately following the date of the SEZ closure, the deep-set longline fishery has zero observed false killer whale incidental mortalities and serious injuries within the remaining open areas of the EEZ around Hawaii; (iii) In the two-year period immediately following the date of the closure, the deep-set longline fishery has reduced its total rate of false killer whale incidental mortality and serious injury (including the EEZ around Hawaii, the high seas, and the EEZ around Johnston Atoll (but not Palmyra Atoll) by an amount equal to or greater than the rate that would be required to reduce false killer whale incidental M&SI within the EEZ around Hawaii to below the Hawaii Pelagic false killer whale stock's PBR level; or (iv) The average estimated level of false killer whale incidental M&SI in the deep-set longline fishery within the remaining open areas of the EEZ around Hawaii for up to the five most recent years is below the PBR level for the Hawaii Pelagic stock of false killer whales at that time.

This document serves as advance notification to fishermen, the fishing industry, and the general public that the SEZ will be closed to deep-set longline fishing starting on February 22, 2019.

NMFS will consider public comments on this temporary rule. NMFS must receive comments by the date provided in the **DATES** heading, not postmarked or otherwise transmitted by this date.

Classification

There is good cause to waive prior notice and an opportunity for public comment on this action pursuant to 5 U.S.C. 553(b)(B). Providing an opportunity for prior notice and comment would be contrary to the public interest because the SEZ closure has been triggered by a second observed M&SI, and immediate closure of the SEZ is necessary to prevent additional mortalities or serious injuries, which may have unsustainable impacts on the Hawaii pelagic stock of the

false killer whale. Furthermore, prior notice and comment is unnecessary because the take reduction plan final rule (77 FR 71259, November 29, 2012) that implements the procedure for closing the SEZ (codified at 50 CFR 229.37(d)(2) and (e)) has already been subject to an extensive public process, including the opportunity for prior notice and comment. All that remains is to notify the public of the second observed mortality and serious injury of a pelagic false killer whale resulting from commercial longline operations, and the longline closure of the SEZ. Although this action is being implemented without the opportunity for prior notice and comment, NMFS is soliciting and will respond to public comments from those affected by or otherwise interested in this rule.

The NOAA Assistant Administrator for Fisheries also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3). Failing to waive the 30-day delay in effectiveness would likely result in additional interactions and possible M&SI to the Hawaii pelagic false killer whale stock. Under the MMPA, NMFS must reduce M&SI of marine mammal stocks protected by take reduction plan regulations. This includes taking action to close the SEZ immediately upon a second observed M&SI resulting from commercial longlining in the EEZ. Accordingly, the SEZ closure must be implemented immediately to ensure compliance with the provisions of the MMPA and the take reduction plan regulations. Nevertheless, NMFS recognizes the need for fishermen to have time to haul their gear and relocate to areas outside of the SEZ; thus, NMFS makes this action effective 7 days after filing this document in the **Federal Register**.

This action is required by 50 CFR 229.37(e)(3), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: February 15, 2019.

Chris Oliver,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

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